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The register of overseas entities – impact on legal mortgages from 5 September 2022

Earlier this year we reported on the action lenders should be taking as a result of the Economic Crime (Transparency and Enforcement) Act 2022 ("**ECTEA**") – "[The Economic Crime \(Transparency and Enforcement\) Act 2022 – what do lenders need to know?](#)".

On 1 August 2022 most of the provisions of ECTEA relating to the registration of overseas entities came into force and the new Register of Overseas Entities (the "**ROE**") was formally launched at Companies House.

On 5 September 2022 the provisions of ECTEA relating to land ownership and registration come into force. The new land registration rules will impact on legal mortgages over a "qualifying estate" (being freehold land or leases of 7 years or more) which are, or have been, granted by an "overseas entity" (a body corporate, partnership or other legal person or entity governed by the law of a country outside the United Kingdom).¹

As explained in this article, the ways in which ECTEA impacts on a legal mortgage granted by an overseas entity will vary depending on the date on which the overseas entity became the owner of the relevant land, the date on which the legal mortgage was granted and the date on which any application to register the legal mortgage was made to HM Land Registry ("HMLR").

Due to the timing of publication, this article does not address scenarios where the legal mortgage in question was granted on or after 1 August 2022, but before 5 September 2022. However, if this is relevant to a situation you are dealing with, we would be happy to discuss it further.

Key points to note:

- If an overseas entity acquires a qualifying estate on or after 5 September 2022 and grants a legal mortgage over it, the overseas entity must be registered on the ROE (and in compliance with any updating obligations) at the time it grants the legal mortgage. Otherwise, HMLR will not register the legal mortgage.
- If an overseas entity *already owned* the qualifying estate at 1 August 2022:
 - The overseas entity has until 31 January 2023 to register on the ROE.
 - After 31 January 2023 a lender must ensure that the overseas entity is registered on the ROE (and in compliance with any updating obligations) at the time it grants any legal mortgage or HMLR will not register it.
 - Until 31 January 2023 the overseas entity can grant a legal mortgage over the qualifying estate and HMLR should register it if the application is received prior to 31 January 2023. However, notwithstanding the transitional period, it is considered best practice for a lender to require an overseas entity granting a legal mortgage to be registered on the ROE at the date of the legal mortgage. If an overseas entity does not apply to register on the ROE by 31 January 2023 an overseas entity and its officers will be criminally liable and, in the future, regulations could be enacted to enable unpaid fines to be secured against the property.

¹ Please note that the land registration aspects of ECTEA do not apply to land owned by an overseas entity if that overseas entity applied to be registered as proprietor before 1 January 1999. However, for simplicity, the entirety of this note assumes that the overseas entity acquired the land after this 1 January 1999 date.

- We suggest that you should be contacting all of your customers on transactions where security over UK property has been granted to you by an overseas entity. You should alert them to the requirement that they register on the ROE and ask them to provide you with evidence of compliance in advance of the 31 January 2023 deadline.
- If an overseas entity is in breach of its obligation to be registered on the ROE (and to keep up to date with its updating obligations), a restriction on title will prevent the overseas entity from disposing of its property. However there are certain exceptions to this restriction. The most useful exception for a lender with a registered legal mortgage over the property is the exception which allows dispositions made in exercise of a power of sale conferred on a registered charge-holder or a receiver they have appointed.

1. Impact of ECTEA on existing legal mortgages which are already registered at HMLR

In this scenario we assume that the secured lender's legal mortgage has already been successfully registered at HMLR. Consequently, the secured lender's main concern will be whether ECTEA impacts (or could impact) on the priority of its existing security, or on its enforcement rights.

1.1 Could ECTEA have an impact on the priority of the security?

Any overseas entity which, as at 1 August 2022, was already registered at HMLR as registered proprietor of a registered estate must register on the ROE (or have made an application for registration that is pending) before 31 January 2023.

If an overseas entity does not effect its registration on the ROE at Companies House by 31 January 2023 it (and its officers) could be criminally liable and daily fines could be payable.

Lenders do not usually want their borrowers and chargors to be in breach of UK legislation. However, this is also potentially relevant to the security itself because ECTEA enables future regulations to be made² to enable unpaid amounts to be secured by a charge on an interest in land (including provision about the priority of any such charge). Currently, however, no such regulations have been published.

1.2 Could ECTEA impact on a secured lender's enforcement rights?

After 31 January 2023, a restriction (which HMLR will apply to the title) will take effect. This restriction will prohibit registration of a transfer, the grant of a lease of 7 years or more, or a legal mortgage, unless the entity is correctly registered on the ROE (and up-to-date with its annual updating obligations) or one of the other exceptions set out in ECTEA applies.

The most useful exception for a secured lender is the exception which allows dispositions made in exercise of a power of sale conferred on a registered charge-holder or a receiver they have appointed. This exception means a secured lender can still appoint a receiver to dispose of the property notwithstanding the restriction on title.

The legislation also provides an exception for dispositions made by other insolvency practitioners in specified circumstances. However there are currently no regulations explaining the meaning of these terms. We expect the exception is intended to cover sales by administrators and liquidators. It is less clear whether Companies Act devices (which are commonly used in restructurings, but which are not strictly processes emanating from insolvency legislation) will be covered. Further regulations are needed before this exception could be considered further.

Other exceptions include dispositions made in pursuance of a statutory obligation or court order or which occur by operation of law and dispositions made in pursuance of a contract made before the restriction is entered in the register.

² Section 39, ECTEA

2. Impact of ECTEA on future legal mortgages

2.1 Legal mortgage granted on or after 5 September 2022 over land which the overseas entity already owned at 1 August 2022

Where a legal mortgage is granted on or after 5 September 2022 the safest course will always be for a lender to ensure that the overseas entity has registered on the ROE (and is in compliance with its updating obligations) on the date it grants the legal mortgage.

However, an overseas entity which was already registered at HMLR as owner of the relevant land as at 1 August 2022 benefits from a 6-month transitional period within which to register on the ROE. This transitional period expires on 31 January 2023. On 31 January 2023 the restriction described above will take effect prohibiting the registration of a transfer, a lease of 7 years or more or a legal mortgage, unless one of the exceptions in ECTEA (as set out above) applies.

Therefore, where an overseas entity is granting a legal mortgage after 5 September 2022 over land it owned prior to 1 August 2022, HMLR should register the legal mortgage, provided HMLR receives the application prior to 31 January 2023. However, if the application will not be received by HMLR prior to 31 January 2023, or the legal mortgage will be entered into after that date, the lender must ensure that the overseas entity is registered on the ROE (and in compliance with any updating obligations) at the time it grants any legal mortgage or HMLR will not register it unless one of the other exceptions to the restrictions on disposals applies.

2.2 Legal mortgage granted after 5 September 2022 over land which the overseas entity acquired on or after 1 August 2022

An overseas entity which acquired a qualifying estate on or after 1 August 2022 will only be able to apply to register at HMLR as the proprietor of that land after 5 September 2022 if, at the time of its application to HMLR it is registered on the ROE, or is exempt.

On 5 September 2022 HMLR will also apply to the title of the qualifying estate a restriction on disposals. This restriction will be subject to the exceptions described above. Therefore, if the overseas entity purported to grant a legal mortgage over the land at a time when it was not registered on the ROE, HMLR would not register it unless one of the other exceptions to the restriction on disposals applied.

Even if an overseas entity subsequently managed to register on the ROE and its application to become registered proprietor of the land was accepted by HMLR, this would not serve to correct the situation vis-à-vis registration of the legal mortgage. When assessing whether the registration exception to the restriction on disposals applies, HMLR will look at whether the overseas entity was registered on the ROE **on the date of the disposition** (i.e. on the date the legal mortgage was granted). Unfortunately, in the scenario set out above, it would not have been.

Addressing ECTEA issues in finance documents

- **Due diligence searches:** On and from 5 September 2022 a lender taking a legal mortgage over land in the UK which is owned by an overseas entity will want to check the ROE to ensure that the overseas entity is registered on the ROE (and up-to-date with any annual update obligations) on the date of the legal mortgage. This confirmation should also be given in the Certificate of Title.
- **New Condition Precedent:** A lender lending to an overseas entity which is providing security over its UK land should require, as a CP to lending, evidence that the overseas entity has registered on the ROE on the date of any legal mortgage granted.
- **Undertakings in finance documents:** Lenders may wish to include in relevant finance documents specific undertakings by overseas entity obligors to comply with their registration and update obligations under ECTEA. However, more general "compliance with laws" undertakings in existing finance documents are also likely to cover these obligations.

3. Does the new register affect overseas entities in any other ways to be aware of?

An overseas entity which made a relevant disposition (a transfer, grant of a lease of 7 years or more or grant of a legal mortgage) during the period between 28 February 2022 and 1 August 2022 must have applied to register on the ROE or provided certain information about its beneficial owners to Companies House by the end of the transitional period (i.e. by 31 January 2023).

As noted in our previous article, it could be easy for an overseas obligor (and its officers) to overlook its registration obligations and, inadvertently, become subject to ongoing fines and criminal liability.

Key dates to note:

28 February 2022	Any Overseas Entity which held registered UK property at this date and which does not register on the ROE is caught by the obligation to provide certain information about its beneficial owners to Companies House, even if it subsequently disposed of the property.
1 August 2022	Register of Overseas Entities launches at Companies House.
5 September 2022	Land registration provisions of ECTEA come into force.
31 January 2023	Expiry of transitional period. On this date overseas entities who already owned land at 1 August 2022 (and which became owner of the relevant land on or after 1 January 1999) must have applied to register on the ROE. By this date an overseas entity which made a relevant disposition (a transfer, grant of a lease of 7yrs+ or grant of a legal mortgage) of a qualifying estate between 28 February 2022 and 1 August 2022 must have applied to register on the ROE or provided certain information about its beneficial owners to Companies House.

If you have any questions as to how the legislation might affect your or your clients we would be delighted to help. Please contact Archie Campbell, Sean Crowley or your usual contact at Stephenson Harwood.

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